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IN THE

# Supreme Court of the United States

October Term, 1955

No. 246

CAPITAL TRANSIT COMPANY, INC., *Petitioner,*

v.

NETTIE E. FOSTER, CLURE EDDIE FOSTER, GENEVA CURRY.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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July 19, 1955.

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*To The Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Capital Transit Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above captioned case on May 26, 1955.

## OPINIONS BELOW

The District Court wrote no opinion. Its memorandum and order overruling the motions for judgment n.o.v. and for a new trial (R. 12-13) are not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 88-90) is not yet reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1955 (R. 91). A petition for rehearing in banc was filed June 8, 1955 (R. 92-100), and was denied per curiam June 16, 1955 (R. 101). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

## QUESTIONS PRESENTED

1. Whether a motion for a new trial under Federal Rules of Civil Procedure 50 (b) and 59 does not require the trial court to exercise his discretion to determine whether the verdict is contrary to *the weight of the evidence.*

2. Whether the evidence supporting the verdict in this case was not so insubstantial, unreliable and unbelievable that judgment n.o.v. should have been granted to petitioner.

## HOW QUESTIONS WERE RAISED

A motion for a directed verdict was made and overruled at the close of all the evidence (R. 78, 79). Motions for judgment n.o.v. and, in the alternative, for a new trial were made and overruled following the verdicts and judgments (R. 11, 12-13). The first question here raised, relating to the standard to be used in

ruling on a motion for a new trial, was specifically raised and argued in petitioner's brief in the Court of Appeals, a copy of which is here included as an appendix to this petition (Appellant's Brief in Court of Appeals, App. 9a-12a). The same question was urged in the petition for rehearing in banc, which is also attached (Petition for Rehearing en Banc and Modification of Judgment, R. 98-100). The second question here raised, relating to the insubstantiality of the evidence, was likewise specifically raised and argued in the Court of Appeals on the original appeal (Appellant's Brief in the Court of Appeals, App. 6a-9a) and in the petition for rehearing (Petition for Rehearing en Banc and Modification of Judgment, R. 93-98).

## FEDERAL RULES INVOLVED

The pertinent part of Federal Rule of Civil Procedure 50 (b) is as follows:

"Rule 50. Motion for a Directed Verdict

"(a) . . . .

"(b) Reservation of Decision on Motion . . . . Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been di-

rected. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

The pertinent part of Federal Rule of Civil Procedure 59 is as follows:

"Rule 59. New Trials; Amendment of Judgments

"(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

"(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

"(c) Time for Serving Affidavits . . . .

"(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

"(e) Motion to Alter or Amend a Judgment . . . ."

## STATEMENT

This suit was brought by respondents against petitioner as the result of injuries incurred when a car operated by respondent Nettie Foster ran into the rear of one of petitioner's buses which had stopped to pick up a passenger.

On Sunday night, January 21, 1951, six members of the Foster family left Greensboro, North Caroline, where they had spent the weekend, and drove back to Washington, D. C. The trip took some six hours, the family leaving Greensboro after dark on Sunday night and reaching Washington about five o'clock Monday morning (R. 26-27). Respondent Clure Foster Sr. was driven directly to his place of work in Washington and turned the driving over to his wife, respondent Nettie Foster (R. 27). In the back seat at the time were Nettie Foster's grandmother-respondent Geneva Curry) and two of the Fosters' children (Jerome Foster and Clure Foster Jr.) (R. 17). At about 6:30 a.m., as Nettie Foster was driving toward their home in another part of the city, the car ran into the rear of petitioner's standing bus (R. 17-18, 28, 44-45, 63, 72-73). The weather was good and there was no traffic in the vicinity (R. 17, 18, 62).

Respondent sued petitioner in the United States District Court for the District of Columbia (Bastian, J.), alleging negligence in the operation of the bus. Nettie Foster and Geneva Curry sued for damages as a result of injuries they received in the accident; Clure Foster Sr. sued for loss of his wife's consortium (R. 2-5).

There were two versions of the accident at the trial. One was given by the only disinterested witness, a Mr. Bishop, and by the busdriver. The other was given by Nettie Foster.

Mr. Bishop, an elderly colored man, was waiting for the bus at a bus stop, and he testified that when it came to a stop beside him, he was opposite its rear door. He walked to the front of the bus and began to get on. He had stepped into the bus and was about to give his transfer to the driver when the Foster car crashed into the right rear of the bus. Mr. Bishop was unequivocal in his testimony that the bus was at a full stop before the collision a sufficiently long time for him to walk from the rear door of the bus to its front (R. 62, 63, 65, 67).

This testimony was corroborated in all respects by the busdriver, who said that when he saw Mr. Bishop, the bus was going about 15 or 20 miles an hour. He pulled over to the curb and stopped some 15 or 20 feet beyond where Mr. Bishop stood. It took Mr. Bishop some three to five seconds to walk to the front of the bus, and he was entering the door when the Foster car rammed the rear of the bus. There were no other passengers in the bus at the time (R. 72-76).

The two police officers who investigated the accident—one called as a witness for respondents and the other called as a witness for petitioner—both testified that they talked to Nettie Foster either at the scene of the accident or at the hospital and that she did not "remember anything about the accident" (R. 50, 51, 68). They both testified that Nettie Foster told them she was "following behind the bus", that she was driving about 25 miles per hour, and that she was unable to recall what happened (R. 50, 51, 68). She made no claim that the bus overtook her and cut in front of her (R. 50-51, 69).

The officers also testified that when they arrived on the scene, the right front end of the bus was close to

the curb, the right rear end was about four feet from the curb, and the front of the car had struck the right rear end of the bus (R. 46-47, 70-71).

The second version of the accident at the trial was given solely by Nettie Foster, who now changed the story she had given the police officers on the day of the accident some 45 months before. She now claimed that the bus, going about 30 or 35 miles per hour, swerved in front of her and stopped so suddenly that she could not avoid running into it (R. 16-22, 26-28). She had stated in a deposition in August, 1952, that her lights were not on, or only her dim road lights were on, at the time of the accident; at the trial in 1954, she testified that her full lights had been on (R. 18, 28-30). Her story at the trial was completely uncorroborated, none of the other occupants of the car claiming to know any of the facts relative to the bus prior to impact (R. 32-35, 36-38).

At the close of the evidence (except for the introduction of an interrogatory relating to schedule) the following colloquy took place (R. 78):

> "The Court: Have you any prayers?
>
> "Mr. Roberson (Counsel for petitioner): I have a prayer for a directed verdict.
>
> "The Court: I'm afraid I will have to overrule you.
>
> "Mr. Roberson: I think Your Honor ought to hear me.
>
> "The Court: It will have to be good. *I think the evidence certainly preponderates, in my opinion, in your favor.* Let's go ahead and listen to what you have to say." (Emphasis added)

After further argument and after the introduction of the interrogatory, petitioner again moved for a directed verdict, and the court overruled the motion (R. 79). The jury returned verdicts against petitioner totalling $39,000 (R. 8-10.) Petitioner then made two motions: (1) a motion for judgment n.o.v. on the ground that there was *"no substantial evidence"* to support the verdicts, and (2) in the alternative, a motion to set aside the verdicts and grant a new trial on the ground that the verdicts were "against the weight of the evidence" (R. 11).

The trial judge, however, overruled both motions in the following language, which constitutes the court's memorandum in its entirety (R. 12-13):

> "The Court is of the opinion that there is *substantial evidence* to support the verdict of the jury. Accordingly, the motions for judgment n.o.v. *and for a new trial* are overruled." (Emphasis added)

Petitioner appealed to the Court of Appeals on the ground, *inter alia,* that the trial court had applied the incorrect standard in overruling the motion for a new trial and, therefore, had, in effect, not passed upon the motion at all (Appellant's Brief in the Court of Appeals, App. 9a-12a). The Court of Appeals (Edgerton, Bazelon and Washington, JJ.) affirmed the judgments, finding what it thought was sufficient evidence *to take the case to the jury.* Its discussion of petitioner's point relative to the motion for a new trial consisted of the following sentence (R. 90):

> "In connection with appellant's other contentions, we find no error affecting substantial rights."

## SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia Circuit erred:

1. In holding, by affirming the judgments, that the standard for passing on a motion for a new trial is whether there is "substantial evidence" to support the verdict.

2. In failing to hold that in passing on a motion for a new trial the trial judge must determine whether the verdict is against the weight of the evidence.

3. In holding that there was substantial evidence to support the verdicts.

4. In affirming the judgments.

## REASONS FOR GRANTING THE WRIT

### 1. The practice in this case of using the "substantial evidence" test to rule upon a motion for a new trial under Federal Rules of Civil Procedure 50 (b) and 59 is directly in conflict with the practice prescribed by this Court and followed in other circuits

The trial court in this case denied both the motion for judgment n.o.v. and the motion for a new trial on the single ground that "there is substantial evidence to support the verdict of the jury" (R. 12). But whether there is substantial evidence to support the verdict is the test only of whether judgement n.o.v. is justified; it is immaterial in a determination of whether a new trial is required.

The District Court's disposition of these motions, as if they both presented the same issue for determination, was directly contrary to this Court's ruling in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940). That case involved a construction of Federal Rule of Civil Procedure 50(b). The District Court had

granted judgment n.o.v. but had failed to rule on a motion for a new trial. The Court of Appeals held the judgment n.o.v. in error but entered judgment on the verdict instead of remanding the case to the District Court for a ruling on the motion for a new trial. Apparently there the Court of Appeals was of the opinion, as were the two lower courts in this case, that the two motions presented in substance the same question for decision and that a ruling on one in effect determined the other. But this Court reversed and said:

> "... The motion for a new trial assigned grounds not appropriate to be considered in connection with the motion for judgment. It put forward claims that *the verdict was against the weight of the evidence* and was excessive; that the court erred in rulings on evidence and in refusing requested instructions. An affirmative finding with respect to any of these claims *would have required a new trial whereas none of them could be considered in connection with the motion for judgment.*
>
> "....
>
> "Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that *the verdict is against the weight of the evidence,* that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.
>
> "....

> "If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon he should also rule on the motion for a new trial, indicating the grounds of his decision . . . ." (311 U.S., 249, 251, 253. Emphasis added)

If the only question on each motion was whether there was substantial evidence to support the verdict, it would have been superfluous to remand for a ruling on the second motion when the Court of Appeals had already held the District Court in error on the first motion. The Court of Appeals for the Eighth Circuit in the *Montgomery Ward* case, in fact, had specifically held that the case must be decided by the jury "if there is *substantial evidence* in support of the issues tendered by the plaintiff" and that "There was *substantial evidence* to warrant the jury" in finding negligence (108 F. 2d 848, 852. Emphasis added). This Court accepted this ruling but nevertheless ordered a remand to the District Court for a ruling on the motion for a new trial, which, as the Court said, raised different issues, such as whether "the verdict is against the weight of the evidence . . . ." (311 U.S., 249, 251).

This Court was not requiring an empty gesture. The two grounds for the two motions are entirely different.[1] In determining whether there is substantial evidence to take the case to the jury or to support the verdict, the trial judge looks primarily to the weight and

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[1] "A motion for judgment, under Rule 50 (b), in accordance with movant's motion for directed verdict, is, of course, to be tested by the same standards as the motion for directed verdict and, therefore, like the latter motion is distinguishable from a motion for a new trial on the ground that the verdict is against the weight of the evidence." 5 Moore's Federal Practice (2d ed), § 50.03, p. 2320. See also § 50.12, p. 2339.

character of the plaintiff's or winning party's evidence. Thus, assuming for purposes of argument in this case that Nettie Foster's testimony, taken in isolation and ignoring the testimony of the police officer introduced by her and the other evidence in the case, was in some wise creditable, the trial court might have felt that the case should go to the jury and that after the verdicts, judgment should not be entered for petitioner. But in determining whether the verdict is against the weight of the evidence—the test on motions for a new trial—the trial judge must weigh *all* the evidence in the case. This is not to say that he puts himself in the place of the jury, or replaces the verdict with his own view of the better result. But he must exercise his discretion and review the whole record to determine whether the verdict is against the weight of the evidence. Thus, in this case, regardless of how substantial Nettie Foster's testimony appeared when standing alone, it clearly evaporated in the face of the diametrically-opposed version of the accident given by the only disinterested witness, the testimony of other witnesses and her own prior contradictory statements.

The District Court's confusion between these two motions and the determinative effect this confusion had on the outcome of this case are dramatically demonstrated by the court's own statement to counsel for petitioner, shortly before the case went to the jury, that "the evidence certainly preponderates, in my opinion, in your favor" (R. 78). This was precisely the type of decision which was subsequently called for by the motion for a new trial but which was never made. The court apparently felt that since there was "substantial evidence" to support the verdict, he was compelled to deny a new trial as well as judgment n.o.v. He never used his discretion, as required by this

Court, to determine where the weight of the evidence lay, though his statement to counsel makes it clear how he would have decided that issue if he had used the correct standard.

A case remarkably similar to this one in its pertinent facts in conflict with it in result is *Magee* v. *General Motors Corp.*, 213 F. 2d 899 (3d Cir. 1954). In that case the trial judge stated after the verdict was rendered that "It is my opinion that that (verdict) is clearly against the weight of the evidence in this case". However, the judge died before he could pass on motions for judgment n.o.v. and for a new trial. A new judge denied these motions, stating:

> "It is my judgment that as a matter of law, under all the evidence, a basis exists for which the law affords relief to the plaintiff." (117 F. Supp. 101, 103.)

The Court of Appeals reversed—not because it disagreed with this finding but because the trial court used the judgment n.o.v. standard in passing on the motion for a new trial. The Court said:

> "The motion for a new trial was based, inter alia, upon the ground that the verdict was *contrary to the weight of the credible evidence.* The district judge in his opinion disposing of the motion did not discuss the weight of the evidence, however. He denied the motion for a new trial upon the ground that he was not free to reweigh the evidence or set aside the verdict because the jury might have drawn different inferences or conclusions or the court might have thought another result more reasonable, but must take the view of the evidence most favorable to the plaintiff. *While this was the proper standard to apply to the disposition of the motion for judgment notwithstanding the verdict, its application to the new trial motion amounted to an abdication of the*

*judge's functions with respect to that motion.* The case must, therefore, go back to the district court for reconsideration of the motion for a new trial in the light of the court's view of the weight of the evidence and all other relevant factors. Among these would obviously be the views of the trial judge expressed at the time the verdict was rendered. See Civil Procedure Rule 63, 28 U.S.C.A." (213 F. 2d, 900. Emphasis added)[2]

As in this case, the trial judge in the *Magee* case *said* he was passing on both motions. But by using the same standard for both motions, he in effect failed to exercise his discretion and pass upon one of them. Yet the Court of Appeals for the District of Columbia Circuit affirmed the judgment in this case with a one-sentence reference to the same question of law.

Federal Rule of Civil Procedure 59 (a) (1) provides that a new trial may be granted in a jury case "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . ."[3] That the weight of the entire evidence and not the substantiality of the evidence on one side had theretofore been the test for granting a new trial is shown by a brief review of a few of the relevant cases in the Court of Appeals for the Fourth Circuit. The rule was there stated as early as 1932 in *Garrison* v. *United States,* 62 F. 2d 41, 42:

"There seems to be some confusion on the part of counsel as to the difference between the duty

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[2] Motion denied on remand, 124 F. Supp. 606, aff'd 220 F. 2d 270.

[3] For a history of the power of a court to grant a new trial, see King, *The Power to Grant New Trials,* 1 Okla. L. Rev. 252 (1948).

to direct a verdict and the duty to grant a new trial after verdict; and the contention is frequently made that the judge should direct a verdict whenever the evidence is such that he would be justified in setting the verdict aside. The distinction, however, is clear. Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence *or may think that the weight of the evidence is on the other side;* for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, *set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence,* or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice. See Felton v. Spiro (C.C.A. 6th) 78 F. 576. Verdict can be directed only where there is *no substantial evidence* to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is. Gunning v. Cooley, 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720. Verdict may be set aside and new trial granted, when the verdict is *contrary to the clear weight of the evidence,* or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice. For a learned and exhaustive discussion of this subject, see the opinion of Judge Lurton in Mt. Adams & E. P. Inclined Ry. Co. v. Lowery (C.C.A. 6th) 74 F. 463." (Emphasis added)[4]

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[4] Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy cited this case with apparent approval in their dissent in *Galloway v. United States,* 319 U.S. 372, 411 (1943). The majority dealt with another question.

This language was subsequently quoted with approval by the Fourth Circuit Court of Appeals in the following cases, among others:

*Aetna Casualty & Surety Co.* v. *Yeatts,* 122 F. 2d 350, 354 (1941), where the court also said:

" . . . On such a motion (to set aside the verdict and grant a new trial) it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict *is against the clear weight of the evidence,* or is based upon evidence which is false, or will result in a miscarriage of justice, *even though there may be substantial evidence which would prevent the direction of a verdict.*" (122 F. 2d, 352. Emphasis added)

*Hawkins* v. *Sims,* 137 F. 2d 66, 67 (1943), where the court added:

" . . . Such motion (for judgment n.o.v.) is to be distinguished from a motion to set aside a verdict and grant a new trial, which is addressed to the discretion of the trial judge and should be granted, *even though there be substantial evidence supporting the verdict,* if in his opinion the ends of justice so require." (137 F. 2d, 67. Emphasis added)

*Snead* v. *New York Central R. Co.,* 216 F. 2d 169, 172 (1954). In this case the Court of Appeals held that in view of the conflicting evidence, the trial court was in error in granting judgment n.o.v. to the defendant. But the Court of Appeals remanded for the trial court to determine whether to set aside the verdict and grant a new trial, even though the trial court had previously denied such a motion for a new trial. The Court of Appeals said:

" . . . If the judge is of the opinion that the verdict of the jury was *against the weight of the evi-*

> *dence* or based on evidence that was false, he should set it aside and grant a new trial, *even though direction of a verdict or judgment n.o.v. was not warranted*". (216 F. 2d, 173. Emphasis added)

The distinction drawn by the Court of Appeals for the Fourth Circuit between "the weight of the evidence" and "substantial evidence to support the verdict" is recognized and enforced by the Courts of Appeals for the Seventh,[5] Eighth[6] and Ninth[7] Circuits. But there has been some confusion over the rule in the Fifth and Sixth Circuits. In *Firestone Tire & Rubber Co.* v. *Nollman,* 107 F. 2d 176 (1939), for example, the Court of Appeals for the Fifth Circuit found no error in a denial of motions for a directed verdict, for judgment n.o.v. and for a new trial, because there was "substantial evidence in the record tending to support the verdict."[8] And, in *Werthan Bag Corp.* v. *Agnew,* 202 F. 2d 119 (1953), the Court of Appeals for the Sixth Circuit stated that a new trial was properly denied because there was "substantial evidence" to support the jury's verdict.

The court of Appeals was plainly delinquent in treating this issue as it did in the instant case. While the trial judge's exercise of direction in denying a motion for a new trial is ordinarily not reviewable, it is well established that the appellate courts can and

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[5] *Adams* v. *United States,* 116 F. 2d 199, 202 (1940).

[6] *Johnson* v. *Dierks Lumber & Coal Co.,* 130 F. 2d 115, 118 (1942).

[7] *Southern Pacific Co.* v. *Guthrie,* 186 F. 2d 926, 932 (1951).

[8] See also *Orient Ins. Co.* v. *Parkhill,* 170 F. 2d 510 (5th Cir. 1948), where the denial of a new trial was sanctioned because there was "substantial evidence" to support the verdict, even though appellant had argued that the verdict was contrary to the "great weight of evidence".

do review a failure to exercise that discretion or a failure to use the correct legal standard in exercising it. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 482-483 (1933); *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251-255 (1940); *Magee* v. *General Motors Corp.*, 213 F. 2d 899, 900 (3d Cir. 1954).

It is certain that the proper exercise of this discretion would have resulted in a new trial since the trial court unequivocally stated that (R. 78):

> "I think the evidence certainly preponderates, in my opinion, in your favor."

The only scintilla of evidence in the entire record which tends to support the verdict is the testimony of one person—the plaintiff who drove the car which struck the bus—and her testimony was contrary to the account she gave on the day of the accident. Even the other passengers in her car failed to testify that the bus had swerved in front of them. The testimony of the bus driver, that his bus had been stopped for some seconds at the time of the rear-end crash, was fully and clearly supported by the only disinterested witness in the case. The possibility that the bus swerved in front of the car and stopped suddenly is dispelled by the disinterested passenger's testimony, for there was so much time between the stopping of the bus and the accident that the driver was able to open the bus door, and Mr. Bishop, a 70 year-old man, was able to walk from the middle to the front of the bus and to mount the steps. The only conceivable explanation of this accident was that Nettie Foster, after an all-night ride from North Carolina, dozed at the wheel and drove into the back of the bus, which was stationary at the time with seven lights on at the rear (R. 63, 73) and the interior lights burning (R. 64).

The "independent evidence" outlined by the Court of Appeals as supporting Nettie Foster's testimony was correctly stated in the court's opinion. The rear of the bus *was* four feet from the curb, and only the right rear of the bus and left fender of the automobile *were* damaged. The only difficulty with this "evidence" is that it was completely immaterial to the issue of negligence. The question at the trial was not whether the bus was parked with its rear slightly out from the curb, for the Court of Appeals has repeatedly held such a position legal. *Kieffer* v. *Capital Transit Co.*, 214 F. 2d 241 (D.C. Cir. 1954); *Marshall* v. *Capital Transit Co.*, 216 F. 2d 636 (D.C. Cir. 1954); *Swank* v. *Capital Transit Co.*, 220 F. 2d 807 (D.C. Cir. 1955). The sole question at the trial was whether the bus was stopped and waiting for a passenger at the time of the accident or whether the bus swerved in front of the Foster car and stopped suddenly.[9]

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The practical importance of the legal question presented in this case in the proper administration of justice in the federal courts could hardly be overstated. Motions for new trials are made in a large percentage of the civil cases tried in the federal courts. The problem is a constantly recurring one and yet one which is often difficult to present on appeal because trial judges, despite this Court's admonition to indicate the grounds of their rulings, [10] frequently are not specific during

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[9] The pretrial order provided: "The gist of the plaintiffs' case is that they were in an automobile and that a bus of the defendant corp. swerved around and came to a sudden stop so that the automobile in which the plaintiffs were riding collided with the bus, not having an opportunity to avoid the collision." (R. 7-8)

[10] *Montgomery Ward & Co.* v. *Duncan*, *supra*, at 253.

this phase of the trial. This case is particularly appropriate for review because of the clear statement by the trial judge of his reason for overruling both motions and because of his prior statement on the record as to where the preponderance of the evidence "certainly" lay.

At the least, petitioner prays that the writ be granted and an opinion written clarifying the procedure under Rules 50 (b) and 59. But the practice in this case was so flagrantly in disregard of this Court's opinion in the *Montgomery Ward* case, and the sanction given that departure from the usual and accepted course of judicial proceedings by the Court of Appeals was so cavalier a treatment of the obvious error, that a summary reversal would be fully justified in the exercise of this Court's responsibility for supervising the proper functioning of the federal judiciary.

**2. There was no substantial evidence to support the verdict in this case, and the complaint should be dismissed**

As already shown, the story given at the trial by Nettie Foster, some 45 months after the accident, was so contradictory to all the other evidence in the case, including her own prior statements, that verdict should have been directed for petitioner. The case having gone to the jury, the proper remedy at this stage of the case, if the course suggested above is not adopted, is for this Court to remand with orders to dismiss the complaint. The clear import of *Globe Liquor Co.* v. *San Roman,* 332 U.S. 571 (1948), and *Cone* v. *West Virginia Pulp & Paper Co.,* 330 U.S. 212 (1947), is that where motions for a directed verdict and for judgment n.o.v. are properly made, as in this case, the appellate court has power to dismiss the complaint if those motions should have been granted by the trial

court. It has been so held by the circuit courts. E.g. *Capital Transit Co.* v. *Gamble,* 160 F. 2d 283 (D.C. Cir. 1947); *Brennan* v. *Baltimore & O R. Co.,* 115 F. 2d 555 (2d Cir. 1940).

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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